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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/825,761	04/15/2004	Marija Heibel	IR 7563-00	8743

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COLGATE-PALMOLIVE COMPANY
909 RIVER ROAD
PISCATAWAY, NJ 08855

EXAMINER	
HARDEE, JOHN R	

ART UNIT	PAPER NUMBER
1751	

DATE MAILED: 04/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/825,761	HEIBEL ET AL.	
	Examiner	Art Unit	
	John R. Hardee	1751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-24 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-17 and 19-24 is/are rejected.

7)☒ Claim(s) 18 is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date (2).
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election of Group II, and the species ester quats in the reply filed on March 23, 2006 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

2. Claims 3 and 6 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on March 23, 2006. As the elected species was not found to be allowable, the claims were not searched beyond the elected species.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1-3 and 20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1-3 do not end with periods. Claim 20 consists of two sentences.

Double Patenting

5. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

6. Claims 1-17 and 19-24 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-7 of U.S. Patent No. 6,864,223 in view of WO 98/28396. The '223 patent claims fabric softening compositions comprising up to 35% of an ester quat in combination with a water dispersible cationic polymer as presently claimed. Addition of a polymer with free hydroxyl groups is not disclosed. The WO teaches that perfumes may be absorbed into organic polymers which have a further polymer at their exterior. The further polymer may be part of an encapsulating shell, and it incorporates free hydroxyl groups. Compositions which comprise these particles include fabric softening compositions comprising ester quats (p. 28, lines 27+). It would have been obvious at the time that

the invention was made to incorporate the polymers of the WO into the softening compositions of the '223, because the '223 claims ester quat fabric softening compositions in combination with a water dispersible cationic polymer as presently claimed, and the WO teaches at p. 2, lines 20+ that the encapsulating polymers taught therein afford improved perfume deposition in surfactant compositions, such as ester quat containing fabric softeners.

7. Claims 1-16 and 18-24 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-18 of copending Application No. 10/694,196 in view of WO 98/28396. The '196 claims fabric softening compositions comprising a cationic fabric softener in combination with a water dispersible cationic polymer as presently claimed. Addition of a polymer with free hydroxyl groups is not disclosed. The WO teaches that perfumes may be absorbed into organic polymers which have a further polymer at their exterior. The further polymer may be part of an encapsulating shell, and it incorporates free hydroxyl groups. Compositions which comprise these particles include fabric softening compositions comprising cationic surfactants (p. 27, lines 9+). Suitable cationics include ester quats (p. 28, lines 27+). It would have been obvious at the time that the invention was made to incorporate the polymers of the WO into the softening compositions of the '196, because the '196 claims cationic surfactant-containing fabric softening compositions in combination with a water dispersible cationic polymer as presently claimed, and the WO teaches at p. 2, lines 20+ that the encapsulating polymers taught therein afford

improved perfume deposition in cationic surfactant compositions, such as ester quat containing fabric softeners.

This is a provisional obviousness-type double patenting rejection.

8. Claims 1, 2, 4, 5, 16 and 19-24 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 8 of copending Application No. 10/914,852 in view of WO 98/28396. The '852 patent claims fabric softening compositions comprising an ester quat in combination with a water dispersible cationic polymer as presently claimed. Addition of a polymer with free hydroxyl groups is not disclosed. The WO teaches that perfumes may be absorbed into organic polymers which have a further polymer at their exterior. The further polymer may be part of an encapsulating shell, and it incorporates free hydroxyl groups. Compositions which comprise these particles include fabric softening compositions comprising ester quats (p. 28, lines 27+). It would have been obvious at the time that the invention was made to incorporate the polymers of the WO into the softening compositions of the '852, because the '852 claims ester quat fabric softening compositions in combination with a water dispersible cationic polymer as presently claimed, and the WO teaches at p. 2, lines 20+ that the encapsulating polymers taught therein afford improved perfume deposition in surfactant compositions, such as ester quat containing fabric softeners. The dependent claims of the present application are drawn to commonly encountered species of ester quats, the intended use of the compositions and commonly encountered physical forms of fabric softeners.

This is a provisional obviousness-type double patenting rejection.

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

11. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

12. Claims 1-17 and 19-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith et al., US 2002/0132749 in view of WO 98/28396. Smith et al., discloses fabric softening compositions comprising up to 35% of an ester quat in

combination with a water dispersible cationic polymer as presently claimed [0024]-[0031] in combination with a chelating compound. Suitable chelants are disclosed at [0031]. The disclosed compositions are liquids designed for addition to a rinse (examples). Suitable ester quats include the triethanolamine ester quats disclosed at [0054]. Suitable cationic polymers are disclosed at [0035]+. Addition of a polymer with free hydroxyl groups is not disclosed. The WO teaches that perfumes may be absorbed into organic polymers which have a further polymer at their exterior. The further polymer may be part of an encapsulating shell, and it incorporates free hydroxyl groups. Suitable polymers are described at p. 6, line 5-8, line 2. Compositions which comprise these particles include fabric softening compositions comprising ester quats (p. 28, lines 27+). It would have been obvious at the time that the invention was made to incorporate the polymers of the WO into the softening compositions of Smith et al., because Smith discloses ester quat fabric softening compositions in combination with a water dispersible cationic polymer as presently claimed, and the WO teaches at p. 2, lines 20+ that the encapsulating polymers taught therein afford improved perfume deposition in surfactant compositions, such as ester quat containing fabric softeners.

Allowable Subject Matter

13. Claim 18 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

14. The following is a statement of reasons for the indication of allowable subject matter: The closest prior art of record is the references relied upon above. The primary references are clearly directed to the preparation of liquid fabric softening compositions which are used in a rinse. Formulation of a dryer sheet is not disclosed or motivated by these references.

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to the examiner, Dr. John R. Hardee, whose telephone number is (571) 272-1318. The examiner can normally be reached on Monday through Friday from 8:00 until 4:30. In the event that the examiner is not available, his supervisor, Mr. Douglas McGinty, may be reached at (571) 272-1029.

The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8100.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

John R. Hardee
Primary Examiner
April 4, 2006